

MENDAS CHA-AG NATIVE CORP.
TROXELL HEBERT

IBLA 85-513

Decided August 26, 1986

Appeals from a decision of the Alaska State Office, Bureau of Land Management, approving an interim conveyance with reserved easements. F 19329-B

Affirmed.

1. Appeals -- Rules of Practice: Appeals: Dismissal

An appeal will be dismissed for lack of diligent prosecution when a party fails to respond to an order of this Board requiring a showing of cause why the appeal should not be dismissed.

2. Appeals -- Rules of Practice: Appeals: Statement of Reasons -- Rules of Practice: Timely Filing

The failure to file a statement of reasons merely subjects an appeal to summary dismissal. It is within the Board's discretion to allow late filing of a statement of reasons in appropriate circumstances.

3. Administrative Procedure: Burden of Proof -- Alaska Native Claims Settlement Act: Appeals: Generally -- Alaska Native Claims Settlement Act: Conveyances: Easements -- Alaska Native Claims Settlement Act: Easements: Generally -- Rules of Practice: Appeals: Burden of Proof

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. A decision to reserve easements will ordinarily be affirmed as long as it is supported by a rational basis and the record.

APPEARANCES: Gary D. Lee, President, Mendas Cha-ag Native Corporation; Troxell Hebert, pro se; Elizabeth J. Barry, Esq., Assistant Attorney General, State of Alaska; Dennis Hopewell, Esq., Deputy Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Mendas Cha-ag Native Corporation (Mendas Cha-ag) and Troxell Hebert (Hebert) have appealed separately from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated February 20, 1985, and modified by decision dated March 20, 1985. The February BLM decision approved an interim conveyance of approximately 2,872 acres (F-19329-B) to Mendas Cha-ag, subject to valid existing rights, submerged lands beneath navigable waters, reservations of the subsurface estate, and six identified easements. The March decision modified the earlier decision to restrict to winter use only an easement for a trail to Lake George. EIN 15 D1 L.

[1] Appellant Hebert filed his combined notice of appeal and statement of reasons with BLM on March 27, 1985, claiming BLM did not reserve sufficient public access to the Tanana River. However, under Departmental regulations governing an appeal to this Board, 43 CFR 4.410(b), only parties who claim a property interest in land affected by a decision relating to land selections under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 (1982), or agencies of the Federal Government or regional corporations have the right to appeal to this Board from such decisions. Neither the case record nor Hebert's statement of reasons demonstrates he is a party to the case who is personally asserting a legally cognizable property interest adversely affected by BLM's decision. Where an appellant fails to allege a cognizable property interest which has been adversely affected by a decision regarding an ANCSA selection, the appeal will be subject to dismissal for lack of standing. Henry W. Waterfield, 77 IBLA 270 (1983). By order dated February 19, 1986, this Board gave Hebert 30 days to show standing. The Board has received no response to that order, and Hebert's appeal is hereby dismissed. See Arctic Mining Co., 5 ANCAB 302 (1981). 1/

[2] Mendas Cha-ag filed its notice of appeal with BLM on March 28, 1985, in conformance with 43 CFR 4.411(a). However, 43 CFR 4.412(b) further requires:

(b) Where the decision being appealed relates to land selections under the Alaska Native Claims Settlement Act, as amended, the appellant also shall file with the Board a statement of facts upon which the appellant relies for standing under § 4.410(b) within 30 days after filing of the notice of appeal. [Emphasis added.]

"Failure to file the statement of reasons and statement of standing within the time required will subject the appeal to summary dismissal * * *." 43 CFR 4.412(c). Form 1842-1 (which was forwarded to appellant with each of the BLM decisions) also gave notice of this requirement. 2/ In its

1/ Hebert's statement of reasons reveals no basis for disturbing the BLM decision.

2/ BLM did not include copies of standard Form 1842-1 in the case file with the copies of the decisions.

notice of appeal Mendas Cha-ag stated that a separate statement of reasons would be filed within the prescribed time. The statement of reasons was due on April 29, 1985. In an order dated February 19, 1986, Mendas Cha-ag was given notice that it had not filed a statement of reasons with the Board, although answers submitted from counsel for BLM and the State of Alaska were in response to a statement of reasons. Mendas Cha-ag was given 30 days to show cause why its appeal should not be dismissed for failure to file a statement of reasons with this Board. On April 28, 1986, the Board received a copy of the statement of reasons and the following statement regarding its failure to file with this Board:

On the 23rd day of March, 1985 Mendas Cha-ag Native Corporation (Mendas Cha-ag) filed its NOTICE OF APPEAL as prescribed by Federal regulation. After waiting a reasonable amount of time to receive further instructions from the Department as to the IBLA identification number and address to send further correspondence to, Mendas Cha-ag sent its STATEMENT OF REASONS to the OFFICE OF HEARINGS AND APPEALS, INTERIOR BOARD OF LAND APPEALS at the address of the REGIONAL SOLICITOR, 701 C Street, Anchorage, Alaska, 99513, with hopes of maintaining good standing.

It is evidenced in the IBLA Office files that correspondence by Certified U.S. Mail has failed to reach Mendas Cha-ag. It should be noted that Mendas Cha-ag filed its Statement of Reasons on the 25th day of April, 1985. All parties with the exception of the Office of Hearings and Appeals received proper service of that Statement. It is evidenced by comparing files with Doyon, Limited that the Regional Solicitor and the State of Alaska have responded to Mendas Cha-ag's Statement of Reasons. Of the two responses Mendas Cha-ag has only received the State of Alaska's response, signed for by a person as yet unidentified to Mendas Cha-ag on August 17, 1985 and delivered to me on March 22, 1986.

It can be shown by the U.S. Postal Service records that Mendas Cha-ag has not benefited by proper service so that it could properly file and answer in this appeal.

Mendas Cha-ag blames the Postal Service for numerous problems with service of documents, including the delivery of the statement of reasons to this Board. Appellant advances no allegation that it sent a statement of reasons to the Board, even though it obviously had notice of this filing requirement. Both the February 20 and March 20, 1985, decisions enclosed DOI Form 1842-1, which outlines the regulatory requirement.

The failure to file a statement of reasons timely merely subjects an appeal to summary dismissal. It is within the Board's discretion to allow late filing of a statement of reasons in appropriate circumstances. Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969). See also Pressentin v. Seaton,

284 F.2d 195, 199 (D.C. Cir. 1960). The answers of both the Regional Solicitor and the State of Alaska responded to appellant's statement of reasons. There having been a statement of reasons filed with opposing parties and answers to this statement of reasons filed by the opposing parties, we find no purpose would be served by dismissing the appeal because of appellant's failure. We will, therefore, address the merits of this case.

[3] Mendas Cha-ag has objected to the reservation of five of the six easements in the interim conveyance, arguing that these easements are duplicative and impose unnecessary cultural and economic impacts.

BLM reserved a winter trail to Lake George identified as EIN 15 D1 L. Mendas Cha-ag challenges the reservation of this trail, arguing that adequate access is also available along George Creek. However, BLM contends the creek is subject to overflows, open water, and rapid deterioration of ice and is hazardous in winter, unlike the trail, which connects with a well-used and easily located portion of an existing pack trail from the Alaska Highway to Lake George (see Memorandum, June 5, 1981, Trip Report for Mendas Cha-ag Native Corporation (Village of Healy Lake) Meeting).

BLM also reserved an easement to provide a trail approximately 300 feet across the narrow isthmus between Lake George and Moosehead Lake, EIN 27 C5, and a lake access easement site at each end of the trail, EIN 27a D9 and EIN 27b D9. Mendas Cha-ag calls for the establishment of an alternative trail route, in order to avoid an alleged traditional burial and crematory area. In response to an earlier expression of appellant's concern, BLM examined the site and two possible alternative easement trail routes (see BLM Memorandum, Aug. 9, 1984, Easement Identification). Shovel testing of the middle portage trail revealed fine ash, although no bones or evidence of cremation were found. A forest fire or campfire were considered to be the probable sources. The northern portage trail was obstructed by roots of large spruce trees. BLM judged the southern portage trail to be best situated and chose it to be the easement trail designated as EIN 27 C5. BLM argues on appeal that ANCSA requires it to maintain access to navigable Moosehead Lake. In order to minimize impacts, only the two staging area site easements and the short easement trail were reserved. No camping would be allowed on these three easements. Mendas Cha-ag does not dispute BLM's conclusion that the area receives heavy use but instead urges that an alternative route be established, citing Goldbelt v. Clark, Civ. No. J 83-0018 (D. Alaska, Aug. 13, 1984).

The final easement contested by Mendas Cha-ag is EIN 29 C4, an unnamed island in Lake George, which was reserved for resting and camping. Mendas Cha-ag argues this easement is unnecessary because public land is available for camping 3 miles away, alleging "[t]hree miles is not an unreasonable distance to travel for a camping site" (Statement of Reasons at 3). Mendas Cha-ag also claims that a similar campsite easement was reserved from an interim conveyance approval to Dot Lake Native Corporation. Appellant alleges EIN 29 C4 and these two previously reserved campsite easements would

impede the efforts of the two Native corporations to develop Lake George as a recreation area. BLM and the State of Alaska counter that the nearest public campsites are 3 miles away and not at the lake front. They find it unreasonable to require the users of the lake to leave their boats, planes, and heavy gear behind and travel to distant public land to camp for the night. They do not find the island campsite duplicative. BLM argues that current use of Lake George is heavy, random, and broadly spread, and that the island would provide one easily located spot which would confine the impact to a single area. BLM notes this easement was chosen at Mendas Cha-ag's suggestion and in response to Mendas Cha-ag's concern regarding the possible spread of accidental fires (See Letter from Mendas Cha-ag to BLM dated June 28, 1985). Mendas Cha-ag responds that it only offered this site as an alternative to other easements.

Section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1976), ^{3/} authorized the Secretary of the Interior to reserve such easements across lands selected by village corporations as are "reasonably necessary" to guarantee, inter alia, "a full right of public use and access for recreation, hunting, transportation, utilities, [and] docks * * *." Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977). See also Alaska National Interest Lands Conservation Act at 43 U.S.C. § 1641(f) (1982). ANCSA at 43 U.S.C. § 1633(a) (1982) outlines the guiding principles to be followed in reserving easements:

- (1) all easements should be designed so as to minimize their impact on Native life styles, and on subsistence uses; and
- (2) each easement should be specifically located and described and should include only such areas as are necessary for the purpose or purposes for which the easement is reserved.

BLM promulgated regulations elaborating upon these ANCSA principles at 43 CFR 2650.4-7. Only such easements as are reasonably necessary to guarantee access to public lands or major waterways (43 CFR 2650.4-7(a)(1)), considering impacts on Native culture, as well as the natural environment and other factors (43 CFR 2650.4-7(a)(3)) shall be reserved. "Present existing use" (*i.e.*, as of December 18, 1976) is the "primary standard," although present existing use is not crucial if there is no reasonable alternative. 43 CFR 2650.4-7(a)(3). Transportation easements are to be reserved if there is no reasonable alternative on public land, the topography is suitable, the easement is not duplicative, and existing travel routes are followed, unless a variance is justified. 43 CFR 2650.4-7(b).

^{3/} Omitted subsections (a) and (b) of 43 U.S.C. § 1616 (1976) concerned the establishment, membership, compensation, procedures, duties, and powers of the Joint Federal-State Land Use Planning Commission for Alaska and authorized the commission to identify public easements across selected lands in Alaska. These two subsections were omitted from the current edition of the United States Code pursuant to former subsection (a)(10) of this section which provided that the commission would cease to exist effective June 30, 1979.

The appellant, as the party challenging the determination, has the burden of showing that a BLM easement determination made pursuant to ANCSA and Departmental regulations is erroneous. Doyon, Limited (On Reconsideration), 77 IBLA 219, 225 (1983); Henry W. Waterfield, *supra*. A decision to reserve easements must be affirmed if supported by a rational basis. Northway Natives, Inc., 69 IBLA 219, 89 I.D. 642 (1982), overruled in part on other grounds, United States Fish & Wildlife Service, 72 IBLA 218 (1983). The basis for reservation of easements is well supported in the record, particularly by the memoranda detailing field examinations of the easement sites selected. On the basis of this record we find BLM has followed the applicable regulatory requirements, had a rational basis for its decision to reserve the easements, and preponderates on the evidence. Therefore, we affirm the February 20, 1985, BLM decision as modified by the March 20, 1985, decision. Appellant has not met its burden.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

